FILED
NOV 16 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-655

J.B.K., INC., et al.,
Petitioners,

vs.

NORMAN CARON, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS RALPH MARTIN, ROBERT RENNAU, NORMAN CARON AND JAMES CAMPBELL IN OPPOSITION

RUSSELL D. JACOBSON
STEPHEN F. VOLEK
R. JAY INGRAHAM
VALARIE ZEECK
2d Fl., Jackson County Courthouse
415 East 12th Street
Kansas City, Missouri 64106
Attorneys for Respondents Ralph Martin and Robert Rennau

ALLEN PURVIS
JOHN DODS
20th Fl., Mercantile Bank Building
1101 Walnut
Kansas City, Missouri 64106
Attorneys for Respondent John Campbell

MANFRED MAIER
5th Fl., Police Headquarters
1125 Locust
Kansas City, Missouri 64106
Attorney for Respondent Norman Caron

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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Respondents Ralph Martin and Robert Rennau, are respectively Prosecuting Attorney and Sheriff of Jackson County, Missouri, respondent Norman Caron is Chief of Police of Kansas City, Missouri, and respondent John Campbell is Chief of Police of Grandview, Missouri, both municipalities located within Jackson County, Missouri. They respectfully request this Court to either deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case, or to grant certiorari and summarily affirm that opinion. The opinion is reported at 600 F.2d 710.

OPINIONS BELOW

Respondents adopt petitioners' statement as to opinions below.

JURISDICTION

Respondents adopt petitioners' statement as to jurisdiction.

QUESTIONS PRESENTED

A group of massage parlor operators, who engage in masturbation of their patrons' genitalia for hire, have by way of an injunction/declaratory judgment action in the Federal District Court challenged the facial constitutionality of state statutes proscribing such conduct as a form of prostitution. These statutes do not prohibit persons from conducting a massage business, but only forbid commercialized masturbatory activity. The massage operators alleged that the state cannot proscribe this type of commercial sexual activity under its police power because such regulation infringes upon the operators' rights of freedom of speech and expression, violates rights of privacy, causes gender-based discrimination, interferes with rights of contract, is unconstitutionally vague and overbroad, and so forth, and also contended that the state had no right under the police power to prohibit prostitution and related commercial sexual exploitation. The constitutional challenge to the new statutes was made in the District Court by means of petitioners' request for a temporary restraining order, which that Court denied and in doing so made a declaration of the facial constitutionality of the laws, which the Eighth Circuit sustained, both by written opinions. These respondent law enforcement officials state that the questions presented are the following:

I. Whether the states under their police power can lawfully proscribe such commercialized sexual activity as prostitution, including commercialized masturbatory massage?

II. Whether the statutory provisions are facially constitutional against the allegations that they violate the rights of the massage parlor operators in such areas as freedom of speech and expression, privacy, contain unreasonable classifications, are gender-discriminatory, are for unlawful purpose, and so on?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves: Article I, Sections 9 & 10; Amendment I, Amendment IX and Amendment XIV, Section 1 of the Constitution of the United States; and Sections 567.010 through 567.100, Revised Statutes of Missouri (1979) (Missouri Criminal Code, Laws of Missouri, 1977, p. 688, S.B. No. 60, Section 1, eff. January 1, 1979). The pertinent portions thereof are set forth in Appendix A to this opposing brief.

STATEMENT OF THE CASE

Operators of several massage parlors, who for a fee indulge their patrons in anal or genitalia masturbatory massage, or as a Missouri appellate court terms it "commercialized masturbation" (*State v. Kayser* (Mo. App. 1977) 552 S.W.2d 27, fn 3), have challenged state statutory provisions in the Federal District Court which proscribe prostitution, and define that commercialized sexual activity as including that form of massage. Recitals by petitioners (Pet., Statement, 10-11) about the procedural events in the District Court is essentially correct, and adopted by respondents. At the hearing before the District Court on January 3, 1979 the operators presented, over objection of respondents, an oral summary of statements made by two Missouri legislators as to the general process of enacting laws by the state legislature (i.e., General Assembly) and as to this particular legislation. The operators also presented, over objection, an affidavit with attachments by a member of a non-legislative committee that helped draft a new criminal code, which contained provisions dealing with prostitution and related offenses, which are the subject of the operators' challenge here.[1]

Statutory Provisions. The challenged statutes are contained in Chapter 567 (full text in Appendix A) Revised Statutes of Missouri, a part of a general revision of the state's criminal laws in 1977 by the General Assembly. The revisions became effective on January 1, 1979. Sec-

1. A second action styled "New Era Health Studio, Inc. et al. vs. Ralph C. Martin, Prosecuting Attorney, et al." was filed shortly after this cause in the U.S. District Court for the Western District of Missouri (Civil Action No. 78-1039-CV-W-3) against two of these respondents (Martin and Rennau) and against some other defendants in this action, which raises the same challenges to the statutes made by petitioner massage operators. That case is presently on motions to dismiss, awaiting the action of this court.

tions 567.010 through 567.100 deal with prostitution and related offenses. They make the performance of an act of prostitution a criminal offense, § 567.020, which is committed by one who engages or offers or agrees to engage in sexual conduct with another in return for something of value to be received by the person or by a third person, § 567.010(2). The various offenses within the general rubric of "prostitution" include prostitution itself, patronizing a prostitute, and promoting prostitution, §§ 567.020, 567.030, 567.050-567.070. "Promoting prostitution", § 567.010(1), "patronizing prostitution", § 567.010(3), and "something of value", § 567.010(5), are all defined, along with other terms used therein. Houses of prostitution are declared public nuisances, with authority vested in the state attorney general and the county prosecutors to bring abatement suits against such institutions, §§ 567.080 and 567.100.

The definition of the act of prostitution or sexual conduct is defined in § 567.010(4) (a)-(c) to include three types of prohibited commercialized sexual activity: (a) sexual intercourse; (b) deviate sexual intercourse; and (c) "sexual contact". The last type means any "touching, manual or otherwise, of the anus or genitals of one party by another, done for the purpose of arousing or gratifying sexual desire of either party".

Operators' Contentions Before the District Court. The operators alleged in their complaint that after January 1, 1979 they would or might be prosecuted by the respondents under the new laws because their businesses involved the manual touching of the anus or genitals of one person by another, done for the purpose of arousing or gratifying sexual desire of either party for something of value, which the operators describe as conduct prohibited by Sections 567.010-567.030, 567.080 and 567.100, RSMo (Complaint

12/14/78, Par. 5).[2] They further alleged that they would be subject to prosecution for solicitation for prostitution under Secton 567.010(3) (c) and 567.010(1) (b) (Complaint, 12/14/78, Par. 7). They then charged that any such prosecution under these laws would violate a plethora of constitutional provisions and guarantees (Complaint, 12/14/78, Par. 19-29).

Operators' Evidence on Legislative History. The operators' attorney gave an oral narrative of statements made prior to the hearing by two state legislators, Representative O'Toole and Senator Caskey, both chairmen of judiciary committees of their respective chambers, which considered the revision of the criminal code (Tr. 26-33). Both related that the only legislative history on the enactments here were the contents of the House and Senate journals, which would include the bill and its amendments, the votes thereon, the conference committee of both houses on the bill and the committee report, and the passage of the conference committee report (Tr. 27, 31), and that the legislative committee reports only recommended passage without comment (Tr. 31). The testimony of Mr. Hunvald (infra) was not a part of this legislative history, and Representative O'Toole related that any testimony by Mr. Hunvald before a committee was not required to be considered by any member of the committee or any member of the House on the legislation (Tr. 28). Mr. O'Toole stated that he did not recall any discussion in the committee or on the floor about venereal disease in regard to this legislation (Tr. 29). Both legislators recalled (Tr. 33)

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2. Because of the lack of a formal record respondents will use the same record references as were employed before the Court of Appeals. Petitioners proceeded below on the original designated record. Reference will therefore be made to the transcript of the hearing of January 3, 1979 in the District Court (61 pages) as "Tr. .....", and in the case of documents by their title and date of filing: "Complaint, 12/14/78, Par. .....".

that the laws were aimed at certain practices of massage parlors, but were not designed to close down massage parlors "per se". No other evidence on the purpose of the legislation was given by the legislators other than that outlined above.

The operators also introduced an affidavit with attachments from a Mr. Hunvald, who was a member of a non-legislative ad hoc committee that drafted a proposed criminal code which was submitted to the General Assembly (Tr. 7-8, Affidavit 1/3/79). Mr. Hunvald was not a member of the legislature nor a staff member of any of the legislative committees. His affidavit (Tr. 10-11, Hunvald Affidavit, Par. 7, p. 3) included the "Comments" section from the Model Penal Code § 207.12, Tentative Draft on "Prostitution and Related Offenses" 1959, which he stated (Affidavit, Par. 7) has been relied upon by the drafting committee.

Hunvald stated that in considering the prostitution offenses the committee had basically followed the approach taken by the Model Penal Code and the New York Penal Codes, the latter largely based upon the former, and that the committee also followed the Comments that were part of the Code's Tentative Draft on the subject (Affidavit, *supra*). These comments were attached to the Hunvald affidavit, and set down a number of reasons and purposes for enacting legislation to proscribe prostitution and related commercialized sexual activities, in the following language:

"COMMENTS

"Section 207.12. Prostitution and Related Offenses

"Although prostitution appears to respond to a widespread demand, and despite indications that a substantial proportion of prostitutes are victims of social

and psychic conditions beyond their control, most students of the problem favor penal repression of commercialized sex. Religious and moral ideas undoubtedly are the main force behind the demand for repression; but utilitarian arguments are also available. Prostitution is an important source of venereal disease, although some contend that the 'amateurs' to whom men turn in lieu of prostitutes present a greater danger in this respect. It has been observed that prostitution is a source of profit and power for criminal groups who commonly combine it with illicit trade in drugs and liquor, illegal gambling and even robbery and extortion. Prostitution is also a source of corrupt influence on government and law enforcement machinery. Its promoters are willing and able to pay for police protection; and unscrupulous officials and politicians find them an easy mark for extortion. Finally, some view prostitution as a significant factor in social disorganization, encouraging sex delinquency and undermining marriage, the home, and individual character.

"2. *Sexual Activity.* This term as defined in Subsection (6) covers not only sexual intercourse but also other lewd acts. Some existing laws confine themselves to offering or receiving the body for 'intercourse.' Since commercial prostitution offers and even features abnormal forms of sexual gratification, it is important to include this. Male as well s female prostitution is covered." (Text from Appendix B herein).

Evidence As to Possible Enforcement Action. No evidence was offered at the hearing by the operators of any threat of prosecution by any of these respondents. Respondents Martin and Rennau filed an affidavit with the Eighth Circuit (March 23, 1979) denying any present plans

to prosecute these operators under Chapter 567, RSMo, in response to a request by the operators for injunctive relief from the Court of Appeals pending the outcome of that appeal, which affidavit was not controverted.

REASONS FOR DENYING WRIT OR GRANTING SUMMARY AFFIRMATION

I

Despite the efforts of the operators in their petition here to avoid the fundamentals governing judicial consideration of legislation regulating commercialized sexual activity designed to appeal to the erotic interests, decisions such as *Paris Adult Theatre I v. Slaton* (1973) 413 U.S. 49, point out that in reviewing such enactments the proper course for the courts is to recognize that a state legislature can do whatever it sees fit to do unless restrained by some express prohibition in the Constitution and that the courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them contentions of public policy that a particular court may happen to entertain. 413 U.S. at 60, and fn 11 (1973). In this vein, *Paris Adult Theatre* noted that state statute books were replete with constitutionally unchallenged laws against such subjects as prostitution, suicide, voluntary self-mutilation, bare fist prize fighting, duels, bigamy, adultery, fornication, "white slavery", billiard halls, gambling, bear baiting, cock fights, and so on, and that "few today seriously claim" that such laws violate the Constitution. 413 U.S. at 68, fn 15. As the courts have repeatedly said, the remedy for laws thought to be unwise, improvident, and out of harmony with a particular school of thought is at the polls and not the courts. *Williamson v. Lee Optical Co.* (1955) 348 U.S. 483, 488.

The exercise of police power is presumed to be constitutionally valid, the presumption of reasonableness being on the side of the police power. Persons challenging laws on grounds that they are unreasonable exercises of the police power have the burden of showing such. Debatable questions as to this reasonableness are for the legislature and not the courts. *Goldblatt v. Town of Hempstead* (1962) 369 U.S. 590, 595-596; *McGowan v. Maryland* (1961) 366 U.S. 420, 425-426, 534. In judging statutory validity, the court's search *is not for a specific constitutional authorization to allow or uphold such a law,* but, rather, the court must accord the law the full benefit of the presumption of constitutionality which is a basic postulate of constitutional adjudication, and *must find clear incompatibility with the U.S. Constitution* to invalidate the challenged law. *New York v. O'Neill* (1959) 359 U.S. 1, 6. Police power will be sustained if any state of facts either known or which could be reasonably assumed affords support for it. *Goldblatt v. Town of Hempstead, supra*; *United States v. Carolene Products Co.* (1938) 304 U.S. 144, 152.

The state is not required to produce a record of testimony or evidence to support a statute's validity, *McGowan v. Maryland* (1961) 366 U.S. 420, 425-6; *Goldblatt v. Town of Hempstead, supra.* As stated in *United States v. Carolene Products Co., supra*:

> ". . . the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of facts made known or generally assumed it is of such a character as to preclude the assumption that it rests on some rational basis within the knowledge and experience of the legislature."

A state's determination must be given every fair presumption of a reasonable support in fact, *McGowan v. Maryland, supra* at 534.

In the landmark cases of *Roth v. United States/ Alberts v. California,* Justice Harlan wrote that "[s]ince the domain of sexual morality is preeminently a matter of State concern, the Court should be slow to interfere with state legislation calculated to protect that morality." 354 U.S. 476, 502 (1957). Furthermore that from at least *Roth* on, this Court has clearly and consistently held that no fundamental "rights" exist free from state regulation under the police power in the field of commercial exploitation of sexual conduct appealing to the erotic interests of the purveyors' customers or patrons, *Roth v. United States/Alberts v. California* (1957) 354 U.S. 476, 495-496 (hereafter *Roth*); also see *Paris Adult Theatre I v. Slaton, supra* at 54, 57-60, 61, 65-68, fn 15; *California v. LaRue* (1972) 409 U.S. 109; *Stanley v. Georgia* (1969) 394 U.S. 557, 560-561 and fn 6, 563-564, 567-568; *Miller v. California* (1973) 413 U.S. 15, 35. In *California v. LaRue* the Court held that a state under its police power could lawfully enact a liquor regulation to forbid such conduct in bars as performing real or simulated acts of masturbation, sexual intercourse, sodomy, oral copulation or any sexual acts prohibited by law, and any actual or simulated touching, caressing or fondling of the anus or genitals. 409 U.S. at 114-115.

Again the state statutes challenged here define prostitution as engaging or offering to engage in sexual conduct in return for something of value (i.e., money or property), Section 567.010(2), (5). Sexual conduct includes not only sexual intercourse and deviate sexual intercourse, but also embraces "sexual contact", meaning the "*touching, manual or otherwise, of the anus or genitals*" which is "*done for the purpose of arousing or gratifying sexual*

desire", 567.010(4) (a)-(c) (emphasis supplied). According to the operators' verified pleadings in this cause they are engaged in this type of conduct for hire. Unlike earlier laws under the new statutory scheme not only are prostitution (567.020) and promoting prostitution (567.050-567.070) deemed offenses, but so is patronizing a prostitute (567.030). Nowhere do these statutes prohibit a person from carrying on a regular massage business, but rather only forbid masturbatory massage as well as sexual intercourse. The statutes demonstrate their purpose, namely to regulate the commercial exploitation of sexual conduct appealing to the erotic nature, which is clearly an allowable purpose under such decisions as *Roth, Paris Adult Theatre, California v. LaRue,* and those cited hereafter.

Massage parlors are hardly unknown to the Court. Between 1972 and 1978 four appeals were dismissed here for want of substantial federal questions, all of which involved state court affirmations of a variety of local ordinances prohibiting various types of activity in massage parlors including massage of persons of one gender by persons of another, where female attendants massaged "every part of the [male patrons'] body" and the massaging of patrons' genitalia. See *Kisley v. City of Falls Church* (Va. 1972) 187 S.E.2d 168, dism'd, 409 U.S. 907 (1972); *Rubenstein v. Cherry Hill* (New Jersey 1974) 417 U.S. 963 (1974); *Smith v. Keator* (N.C. 1974) 206 S.E.2d 203, dism'd, 419 U.S. 1043 (1974); and *City of Indianapolis v. Wright* (Ind. 1978) 371 N.E.2d 1298, dism'd, 58 L.Ed.2d 97 (1978). Such dismissals act, of course, as an adjudication on the merits, e.g. see *Hicks v. Miranda* (1975) 422 U.S. 322, 343-345; *Rose v. Locke* (1975) 423 U.S. 48, 51.

In *Kisley* the evidence showed that the female attendants would massage "every part of the male patrons' bodies", essentially the problem presented here. On appeal the operators argued that the ordinance prohibiting such

service rendered to their customers violated the Due Process and Equal Protection clauses by arbitrarily interfering with the operators' legitimate occupation and constituted an unreasonable exercise of police power (see summary of 72-189, Appendix C), but this Court dismissed. In *Rubenstein* the operators contended that the prohibitions against certain forms of massage activity affected the operators' fundamental right to operate a legitimate business and involved "suspect criteria", i.e., gender (see the operators' Jurisdictional Statement filed in this Court, Appendix C), but that appeal was nevertheless dismissed. *Smith* raised many of the same contentions, which are all identical in substance to those raised throughout this cause from the District Court on (see Appendix C). The question here is essentially the same as in those earlier cases, namely whether a specific type of massage activity can be lawfully prohibited under the police power, and in *Kisley* it is clear that this activity involved the same type of conduct questioned here, that is masturbatory massage.

In 1978 this Court dismissed an appeal by massage parlor operators of an Indiana Supreme Court decision which upheld a city-county ordinance prohibiting massage therapists from administering massage to persons of the opposite sex, and from "touching the sexual or genital area of any person or from performing, offering or agreeing to perform any act which would require the touching of the patron's genitals" *City of Indianapolis v. Wright* (Ind. 1978) 371 N.E.2d 1298, 1299, app. dism'd, 58 L.Ed.2d 97 (1978). The operators contended that the ordinance violated due process of law by depriving the massage therapists of a fundamental right to earn a livelihood, unconstitutionally discriminated on the basis of gender, and created an unconstitutional irrebuttable presumption that opposite sex massages lead to illicit sexual relations, but the Indiana court rejected these claims in the light

of the *Kisley, Rubenstein,* and *Smith,* and other decisions on the question, see 371 N.E.2d at 1300-1301. On appeal the operators raised questions as to whether the state court properly ruled that the ordinance violated due process or equal protection; wrongfully prohibited employees from treating members of the opposite sex in violation of the ordinance engaged in a conclusive presumption that massage will cause social and moral problems and lead to illicit and illegal sexual activities; and so forth (see summary of No. 78-73 in Appendix C).

In 1978 the Court also denied a certiorari petition in *Caesar's Health Club v. St. Louis County* (Mo. App. 1978) 565 S.W.2d 783, where massage operators sought review of their arguments that the trial court's failure to require, and the failure of the county to show a compelling state interest to justify a challenged ordinance, deprived the operators of rights guaranteed them by the Constitution; that the ordinance violated the right of privacy; and violated the Due Process clause by reason of vagueness and overbreadth (see summary No. 78-420, Appendix C). The ordinance challenged in *Caesar's Health Club* had been enacted by a Missouri county and was almost a literal copy of the statutes challenged here, see text of ordinance at 565 S.W.2d at 785. On November 6, 1978 the Court denied review, 58 L.Ed.2d 346. The operators in *Caesar's* contended that the ordinance infringed upon "fundamental sexual rights", analogizing the purveying of commercialized sexual conduct to the constitutionality protected areas of ideas, belief, religion, cultural concerns, free speech and expression, and so forth (Petition, *Caesar's Health Club,* 10-12), which is the essence of the argument advanced by the operators here. In *Caesar's* they made a further effort to equate the sexual conduct with the forms of private sexual conduct found by such cases as *Stanley v. Georgia,* to be constitutionally protected. It is submitted that the Court's

denial of review in *Caesar's Health Club,* especially when read in the light of the affirmations in *Kisley, Rubenstein, Smith,* and *City of Indianapolis,* along with such other rulings as *Paris Adult Theatre, California v. LaRue, Roth et al.,* establish the lack of merit in the contentions advanced here by the massage parlors.

Other jurisdictions have adopted the same or similar laws, based in good part on the Model Penal Code. The courts in these jurisdictions appear to have uniformly sustained the constitutionality of these statutes when applied to commercialized masturbation situations, e.g. *Floyd v. Texas* (Tex. Crim. App. 1978) 575 S.W.2d 21, app. dism'd for want of sub. federal question, 61 L.Ed.2d 272 (1979); *Ringer v. State* (Tex. Crim. App. 1979) 577 S.W.2d 711; *People v. Block* (1972) 71 Misc.2d 714, 337 N.Y.S.2d 153; *People v. Costello* (1977) 90 Misc.2d 431, 395 N.Y.S.2d 139; and *Thompson v. City of Huntsville* (Ala. App. 1976), 329 So.2d 664, cert. den., 329 So.2d 666 (Ala. 1976). They have likewise rejected challenges made to the prostitution laws on the same constitutional grounds urged here by the operators, e.g. *People v. Smith* (1973) 44 N.Y.2d 613, 378 N.E.2d 1032; *Blake v. Delaware* (Del. Supr. Ct. 1975) 344 A.2d 260, and *Delaware v. Hicks* (Del. Supr. Ct. 1976) 360 A.2d 150, both aff'd., 373 A.2d 205 (Del. Sup. Ct. 1977). Federal courts have rejected numerous attacks upon massage parlor ordinances, holding, for example, that prohibitions upon massage of specific parts of the body are within the police power and are justified for reasons of public morality and decency, *Brown v. Brannon* (M.D. N.C. 1975) 399 F. Supp. 133, 147-148, aff'd, 535 F.2d 1249 (C.A. 4, 1976). Also see *Bayside Enterprises, Inc. v. Carson* (M. D. Fla. 1978) 450 F. Supp. 696, 709-710 (16); *Brown v. Haner* (W.D. Va. 1976) 410 F. Supp. 399, 401; *United Health Clubs of Amer. v. Strom* (S.C. 1976) 423 F. Supp. 761, 765-766; and *Tomlinson v. Mayor & Aldermen* (C.A. 5, 1976)

534 F.2d 570, 571-572. Even cases cited by the operators in their petition contradict their own position, for example *Cianciolo v. Members of City Council* (E.D. Tenn. 1974) 376 F. Supp. 719, 724, held that there was nothing constitutionally to prevent the enactment of an ordinance regulating the particulars of massage, including prohibition of massaging restricted parts of the body; also the views expressed in *Hart Health Studio v. Salt Lake County* (Utah 1978) 577 P.2d 116, 119.

If prostitution and related commercialized exploitation cannot be constitutionally outlawed, as the massage parlor operators urge, then why is it unlawful for the states to prohibit such, but constitutional for the U.S. Congress (see 18 U.S.C. §§ 2421, 2422) to make the interstate transportation of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose" a criminal offense? If antiprostitution laws are unlawful under the Federal Constitution then the Commerce Clause could hardly override such fundamental invalidity. In *Hoke v. U.S.* (1913) 227 U.S. 308, 321, where the Court upheld the power of Congress to enact 18 U.S.C. §§ 2421 and 2422, they also found that "[t]hat is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime." In 1978 the Congress enacted Public Law 95-225 [6.1585]; Feb. 6, 1978, which makes "prohibited sexual conduct" a criminal offense where minors are transported and exploited for such purposes, and which the Congress has declared embraces masturbation, to prevent commercialized sexual exploitation.

The Court has repeatedly affirmed proscriptive state legislation over other categories of sexual conduct that did not fall within the ambit of commercialized sexual activity as proper exercises of state police power. For example in *Doe v. Commonwealth's Attorney for City of*

Richmond (E.D. Va. 1975) 403 F. Supp. 1199, a three-judge court upheld a state statute making sodomy an offense even though committed between consenting adults. The opinion further pointed out that laws forbidding adultery, fornication and other such conduct were not unconstitutional even though the participants were agreeable and the subject matter was sexual intimacies, 403 F. Supp. at 1200-1202. This opinion was affirmed, 425 U.S. 901 (1976). In like vein are the decisions which hold that the states may under their police power punish such offenses as bestiality, buggery, fellatio, and so forth, see *State v. Crawford* (Mo. 1972) 478 S.W.2d 314, aff'd, 409 U.S. 811 (1972); and *Rose v. Locke* (1975) 423 U.S. 48.

This extended discussion is made to indicate the breadth of the judicial opinion which has upheld the broad scope of the "domain" of state police power in matters of sexual morality. Actually the operators here are asking the Court to sit as a superlegislature, and overturn these laws for a number of sociological reasons which they advance in their petition (see Petition 19). Yet this action is completely contrary to the many decisions of the Court.

It should be added that the operators' own evidence reinforces the lawful purposes of these enactments. As pointed out here in the Statement of the Case, the Hunvald affidavit makes the claim that the drafting committee relied upon the commentary from the Model Penal Code in developing the statutory provisions. Contrary to the conclusions of the operators, their own evidence shows a large number of substantial purposes and reasons for enacting such legislation. After first concluding that "[a]lthough prostitution appears to respond to a widespread demand, and despite indications that a substantial proportion of prostitutes are victims of social and psychic conditions beyond their control, *most students of the problem favor penal repression of commercialized sex*" (Emphasis sup-

plied) The comments then identify the main reasons underlying penal repression as religious and moral, but continues with several utilitarian reasons for such legislation: (1) prostitution is an important source of venereal disease; (2) it is a source of profit and power for criminal groups who commonly combine it with illicit drug and liquor trade, illegal gambling, robbery and extortion; (3) it is a source of corrupt influence on government and law enforcement machinery, as a source of bribery and extortion of officials; and (4) is considered a significant factor in social disorganization, encouraging sexual delinquency and undermining the marriage, the home and individual character (Comments, pp. 170-171, contained in Appendix B).

It recommends that the term "sexual activity" or sexual conduct should be broadened to cover not only sexual intercourse, but other lewd acts, since prostitution offered and even featured abnormal forms of sexual gratification, so that it was important to include these as well, and also to cover both male and female prostitution (Comments, p. 174, in Appendix B). Clearly then from the operators' own evidence there were a multiplicity of reasons for enacting the legislation which they challenge, all of them valid when read in light of decisions like *Paris Adult Theatre,* and so forth.

The operators have not shown that the sole purpose of this legislation was to prevent the spread of venereal disease, as witnessed by the statements of the two state legislators and the commentary from the Model Penal Code cited above, but even if this were the case then their argument would still fail. If an established purpose is invalid, it is the general rule that a law must still be upheld if it can be supported for other reasons such as public morality, crime prevention, etc. In addition to the legislators' comments and the code commentary, the District Court concluded that the legislation could be sustained for at least

four rational factors (adopted by the Court from *State v. Hicks, supra*), which could be taken separately or together: the public marketing of sex would produce a great strain upon the institution of marriage; or innocent citizens would, on occasion, be affronted by unwanted solicitation; or a higher incidence of disease would otherwise occur; or criminal manipulation would surround the activity (District Court Order, 1/12/79, Appendix to Petitioners' Brief, A22-23). The Court of Appeals likewise affirmed the existence of lawful purpose underlying the legislation (see Opinion, Pet. App. A5).

In addition, the Court in *Caesar's Health Club v. St. Louis County, supra,* upon which authority both the District Court here (see Order, 1/12/79, Pet. App. A21-A22) and the Court of Appeals (see 600 F.2d at 712) relied, concluded that the ordinance prohibiting the same type of activity was clearly referable to the police power, and "disclosed on its face a purpose to protect and further the health, morality and general welfare of the citizenry" and to further it in a reasonable way. 564 S.W.2d at 786-787 (9-10).

As stated earlier should an established purpose be found invalid this would still not furnish grounds to invalidate a law, because if by a particular mode of reasoning, the constitutionality of legislation may be sustained, it is irrelevant whether such reasoning in fact underlaid the legislative decision, as it is also irrelevant that the statute did not extend to all to whom the postulated rationale might in logic apply. *Flemming v. Nestor* (1960) 363 U.S. 603, 612. Speculation as to legislative and executive motive is to be shunned by the courts. *Rosado v. Wyman* (1970) 397 U.S. 397, 419. Where a statute is constitutional on its face courts will not void it on allegations of improper purpose, even though there might be some demonstration of a wrongful motive in utterances by members of the legislative body

that enacted the law. *U.S. v. O'Brien* (1968) 391 U.S. 367, 382-386; *Palmer v. Thompson* (1971) 403 U.S. 217, 224-5. Laws are frequently multipurposed, and the Equal Protection Clause of the Fourteenth Amendment does not countenance a court's speculative probing into the legislative purposes of a coordinate branch of government to ascertain constitutionality, *McGinnis v. Royster* (1973) 410 U.S. 263, 276-277, especially in light of the elusive nature of searches for legislative purpose, which is another reason for judicial avoidance of such speculative expeditions. *Palmer v. Thompson, supra* at 224.

Yet even if the control of disease was the sole purpose for the enactment of the statutes and there was no conclusive or scientific data or proof of a connection between the prohibited act and the disease, this would still not serve to invalidate the law. The Court has not hesitated to sustain statutes in the field of commercialized sexual activity although there was no scientific data to conclusively demonstrate an adverse effect between the prohibited conduct and members of society, or in cases where there existed manifest empirical uncertainties. Scientifically certain criteria to support police power legislation is not demanded of legislatures. *Paris Adult Theatre I v. Slaton, supra* at 60-61; *Ginzberg v. New York* (1968) 390 U.S. 629, 642-643; and *Roth/Alberts, supra,* 354 U.S. at 501 (Concurring Opinion, J. Harlan). Legislators and judges have long acted upon various unprovable assumptions, which underlie much state regulation of commercial and business affairs, as is also the case with federal regulation of antitrust and securities, environment, education, and so on. The fact that a legislative directive "reflects unprovable assumptions about what is good for the people including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional." *Paris Adult Theatre, supra* at 61-62; *Whalen v. Roe* (1977) 429 U.S. 589, 598.

Justice Harlan in discussing the purpose of a California statute in *Roth* which made the selling of obscene materials an offense, found that it was "not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a state may deem obnoxious to the moral fabric of society", and "even assuming that pornography cannot be deemed ever to cause, in an immediate sense, criminal sexual conduct, other interests within the proper cognizance of the States may be protected by the prohibition placed on such materials. The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards." 354 U.S. at 501-2. *Paris Adult Theatre* recognized that there was a "legitimate state interest" at stake in "stemming the tide of commercialized obscenity" for a wide variety of reasons which the Court took notice of, such as an interest of the public in the quality of life and the total community environment, the tone of commerce in great urban centers, and public safety based upon arguable correlations between obscene material and crime or other antisocial behavior. 413 U.S. at 57-60, and fn 8, 9, and 10. A legislature may legitimately act to protect the social interest in order and morality, *Id.* at 61; *Roth, supra,* at 485.

In the last analysis the operators' arguments represent an effort to obfuscate the issues here because of their inability to cite to any authority of substance, particularly in this Court's decisions, which demonstrates that these statutes constitute an improper exercise of the State's police power. They have been unable to point to any fundamental "right" to engage for hire in the act of masturbation of the anus or genitals for the purpose of arousing or gratifying sexual desire. Nor have they been able to raise a viable issue of gender discrimination, the latter contention

specifically rejected as a constitutional objection by such holdings as *Kisley v. City of Falls Church, Rubenstein v. Cherry Hill, Smith v. Keaton,* and *City of Indianapolis v. Wright,* particularly where the statutes are facially neutral. In fact Section 567.040 specifically points out that the sex of the parties is immaterial. As stated in the beginning, this Court has long held that states under their police power have a legitimate interest in enacting legislation to prohibit the commercialized exploitation of sexual conduct appealing to the erotic interests, and these statutes are clearly within the framework of that precept.

II

Both in the District Court and in the Court of Appeals the operators strenuously urged a wide variety of specific constitutional objections to these laws, predicated upon such claims as rights of privacy, freedom of speech, association and expression, right to employment and, of course, the right to operate a legitimate business enterprise. They contended that the statutory provisions are unconstitutionally vague and overbroad, and violate the Equal Protection Clause, apparently because of alleged irrational classifications and gender discrimination. Since the laws have not been applied to the operators by these respondent law enforcement officials, these contentions go to the facial validity of the provisions, and not to any speculative application. Respondents urge that all of these specific objections have been raised in prior causes before this Court, and have been rejected, particularly in *Paris Adult Theatre, Kisley, Rubenstein, Smith, City of Indianapolis, Caeser's Health Club,* and the other cases cited under Point I. The fact is that for all practical purposes all of the operators' contentions made here have been ruled on before in an adverse fashion to their position.

The Equal Protection Claims

(A) *Unreasonable Classification.* The operators claim that an equal protection violation exists because those who practice prostitution and those who patronize prostitutes are treated differently from a standpoint of punishment than those who promote, pander or purvey (Pet. 15-17). Prostitution (567.020) and patronizing (567.030.2) are class B misdemeanors, while promoting is made a varied-class felony (567.050-567.070). As the District Court held (Pet. App. A24-26), there is ample authority to support a state's authority to impose a greater penalty on one class than another. Similar classification arguments were advanced and rejected in *Kisley, et al.* There is, of course, no issue of selective enforcement present, nor have any of the usual criteria on such an argument been demonstrated.

The Fourteenth Amendment allows states a wide scope of discretion to enact laws which affect some groups of citizens differently than others, unless the classification rests on grounds wholly irrelevant to the achievement of the state's objectives. The legislatures are presumed to have acted within their constitutional powers despite the fact that in practice their laws result in some inequality, and a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan v. Maryland* (1961) 366 U.S. 420, 425-426. *McGowan* found an absence of invidious discrimination in a state Sunday closing law, holding that the proscription of different substantive offenses in different counties was a matter for legislative discretion. There is no lack of rational support or lack of legitimate governmental interest for the suppression of prostitution and related commercialized sexual exploitation, e.g. *Caesar's Health Club v. St. Louis County, supra; People v. Costello, supra.*

The arguments about different penalties and conduct for hire were specifically raised and rejected by *State v. Hicks* (Del. Super. 1976) 360 A.2d 150, aff'd, 373 A.2d 205 (Del. Supreme Ct. 1977). There a defendant argued that a stricter penalty for the "seller" than for the "buyer" in the prostitution exchange violated Equal Protection, but the Court relying upon *Railway Express Agency v. New York* (1949) 336 U.S. 106, upheld the classification, finding that the state could reasonably conclude that a man or woman who performs sexual conduct for money is a greater danger to society than a woman or man performing the act free of charge; the person charging a fee can reasonably be viewed as being more likely to engage in sexual activity less responsibly or discriminately, since his or her primary motivation is the acquisition of money. 360 A.2d at 153-154 [5]. Relying upon *Railway Express* and *Blake v. State* (Del. Super. 1975) 344 A.2d 260, aff'd, 373 A.2d 205 (Del. Supreme Ct. 1977), the Delaware Court also concluded that there is a legitimate and reasonable basis to conclude that curtailment of the seller's activities will reduce the incidence of criminal activity in a multi-party, sequentially related crime situation; and the state's decision to regulate the "seller" and not the "buyer" is considered rational, even though it is frequently obvious that it is not the only available technique for deterring an activity. *Ibid.* Also see *Railway Express v. New York, supra* at 110.

(B) *Alleged Lack of Rational Basis for Chapter 567.* The operators argue that the statutes lack a rational basis (Pet. 17-20), contentions which these respondents have dealt with under Point I here.

(C) *Claims of Infringement of Fundamental Rights.*

Right to Operate a Legitimate Business. This argument (Pet. 20-21) is also embraced in the refutation set

forth by respondents under Point I, with perhaps some additional comment. The operators are by their own admission carrying on a "business" of commercialized sexual exploitation. Cases as *Roth/Paris Adult Theatre; Miller v. California; California v. LaRue; Ginzburg v. New York; Ward v. Illinois, infra; U.S. v. Reidel, infra,* and so on have unhesitatingly held such exploitation to be a proper subject for statutory proscription under the police power of the states or its federal counterpart. A recent example of the federal exercise of this power was when Congress enacted the "Protection of Children Against Sexual Exploitation Act of 1977" (PL 95-225 [S.1585]; February 6, 1978), now embodied in 18 U.S.C. Sections 2251, 2252, 2253 and 2423, which includes masturbation for purposes of sexual exploitation for commercial gain, and used definitional language similar to that employed here. Of course, as pointed out by *Paris Adult Theatre,* the fact that consenting adults are involved does not render such proscriptions invalid, 413 U.S. at 68-69 and fn 14 and 15. Also see *Doe v. Commonwealth's Attorney, supra.*

The operators also cited a number of cases (Pet. 21) which dealt with laws prohibiting cross-sexual massage, that is massage of a patron of one sex by one of the opposite gender. This whole line of authority on the constitutional invalidity of that prohibition is no longer valid, having been rejected by the Court's rulings in the *Kisley, Rubenstein, Smith,* and *Wright* decisions.

Free Speech. The operators have argued from the District Court on, that prostitution including commercialized masturbation, constitutes a form of free speech, expression, or association, and is therefore protected by the First Amendment. They raise the argument again here (Pet. 21-22). Yet, like the rest of their arguments, they are unable to produce any authoritative judicial support

for it. The courts have repeatedly examined the question of whether commercialized sexual contact is protected as free speech and expression, and has rejected such. E.g. *Roth v. U.S./Alberts v. California, supra* at 483-488; *Paris Adult Theatre I v. Slaton, supra* at 53-56; *Miller v. California* (1973) 413 U.S. 49, 53-56; *Ward v. Illinois, supra* at 768-769; *California v. LaRue, supra* at 113-119; also see *Caesar's Health Club v. St. Louis County, supra* at 788; *Brown v. Haner* (W.D. Va. 1976) 410 F. Supp. 399, 400-401; *U.S. v. Moses* (D.C. App. 1975) 339 A.2d 46, 51-53; *Bayside Enterprises, Inc. v. Carson* (M.D. Fla. 1978) 450 F. Supp. 696, 710.

This is not expression by the operators, or by their customers, of political, philosophical or religious ideas, or any of the other categories usually found beneath the First Amendment's umbrella. Rather Chapter 567 defines as criminal activity the performance and pandering of certain types of sexual conduct, namely sexual intercourse, deviate sexual intercourse, and masturbatory massage. The issue is simply whether commercialized masturbation constitutes free speech, and there seems to be a remarkable lack of judicial support which holds that it is. In *Bayside Enterprises* a contention that regulation of massage activities infringed upon First Amendment rights of expression was held frivolous: "In this context, the Court can perceive no communicative characteristics of any substance which would bring massage parlors within the ambit of the first amendment's free speech clause." 450 F. Supp. at 710. In *California v. LaRue* where state authority was sustained to prohibit the performance of acts, or simulated acts of intercourse, masturbation, and of touching, caressing, or fondling of genitals or anus, in bars and nightclubs, it was stated that an expression moved from the printed page to the commission of public acts, the scope of permissible state

regulation significantly increased. In the case of the acts in question, which the Court concluded partook more of "gross sexuality" than of communication, the states were well within the constitutional bounds of the police power to proscribe such, 409 U.S. at 117-119. As pointed out in *U.S. v. Moses,* a prostitute's invitation to commercial intercourse is not an essential part of any expression of ideas. 339 A.2d at 52.

Furthermore, in view of a lack of authoritative support holding that prostitution or commercial masturbation is a "fundamental right", plus the long line of decisions upholding statutory proscriptions of commercial sexual exploitation, the argument about protected speech is even more remote.

Right of Privacy. The operators contend (Pet. 22-23) that under *Stanley v. Georgia* (1969) 394 U.S. 557, for example, the activities defined by the Missouri statutes should enjoy the right of privacy defined in that line of cases. However, in spite of this assertion, the Court has drawn a specific distinction between the privacy of the home and commercialized exploitation in the field of sexual conduct. *Stanley v. Georgia* is clearly inapposite because it held that while private possession of obscene material for private uses was protected, the commercial sale or exploitation of such matter was not. 394 U.S. at 560-561 and fn 6, 567-568 and fn 10. *Stanley* in fact recognized the "important interest" of the state in the regulation of the commercial distribution of obscene material, as distinguished from mere private possession. *Id.* at 563-564.

In *Paris Adult Theatre* privacy was asserted by "adult" theatre operators, but the Court rejected, stating that even assuming that the operators had vicarious standing to assert potential customers' rights, "it is unavailing to

compare a theatre, open to the public for a fee, with the private home of *Stanley v. Georgia* . . ., and the marital bedroom of *Griswold v. Connecticut*. . ." 413 U.S. at 65. Only personal rights which can be deemed "fundamental" were guaranteed by the Fourteenth Amendment, encompassing the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing, but not including the watching of obscene movies in places of public accommodation. *Id.* at 65-66. They "declined to equate the privacy of home relied on in Stanley with a 'zone' of 'privacy' that follows a distributor or a consumer of obscene materials wherever he goes." *Id.* at 66.

This rejection of privacy claims is well-established, e.g. *U.S. v. Reidel* (1971) 402 U.S. 351, 354-355; *U.S. v. Orito* (1972) 413 U.S. 139, 141-143; *Brown v. Haner* (W.D. Va. 1976) 410 F. Supp. 399, 401; *Brown v. Brannon* (M.D. N.C. 1975) 399 F. Supp. 133, 138-139, 149; *U.S. v. McKean* (D.C. App. 1975) 338 A.2d 439, 440; *Harris v. U.S.* (D.C. App. 1974) 315 A.2d 569, 574-575. Privacy was disallowed in *Caesar's Health Club*, 565 S.W.2d at 787-788, in interpreting an almost identical law.

CONCLUSION

For these reasons, the petition for certiorari should be denied. However, because petitioners' contentions have been repeatedly considered and rejected by this Court in cases such as *Paris Adult Theatre, Roth, LaRue, Kisley, Rubenstein, Smith*, and *City of Indianapolis*, as well as by the *Caesar's Health Club* holding, respondents respectfully ask the Court to consider imposing such alternative relief as summary affirmation. This Court has employed such action in certiorari proceedings where decisions below were deemed correct in light of controlling authorities and should

be affirmed, e.g. see *Landau v. Fording* (1967) 388 U.S. 456, affirming a state court judgment holding a film to be obscene. Such action respondents believe is warranted here because it would terminate this case and other actions pending in the Federal Courts challenging these statutes, and because the ability of the enforcement officers to investigate and institute actions under these laws, if such need should arise, is impaired, if not effectively prevented, by the maintenance of this and like actions despite a lack of substance to their constitutional complaints. As pointed out in *New Motor Vehicle Bd. v. Orrin W. Fox Co.* (1977) 434 U.S. 1345, 1351, a State suffers a form of irreparable injury where it is prevented from effectuating statutes enacted by representatives of its people.

Respectfully submitted,

RUSSELL D. JACOBSON
STEPHEN F. VOLEK
R. JAY INGRAHAM
VALARIE ZEECK
2d Fl., Jackson County Courthouse
415 East 12th Street
Kansas City, Missouri 64106
Attorneys for Respondents Ralph Martin and Robert Rennau

ALLEN PURVIS
JOHN DODS
20th Fl., Mercantile Bank Building
1101 Walnut
Kansas City, Missouri 64106
Attorneys for Respondent John Campbell

MANFRED MAIER
5th Fl., Police Headquarters
1125 Locust
Kansas City, Missouri 64106
Attorney for Respondent Norman Caron

APPENDIX

APPENDIX A

Constitutional and Statutory Provisions Involved

Article I, Section 9 of the Constitution provides, in pertinent part:

> "No bill of Attainder or ex post facto Law shall be passed."

Article I, Section 10 of the Constitution provides, in pertinent part:

> "No state shall pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . ."

Amendment I of the Constitution provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, ..."

Amendment IX of the Constitution provides:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV, Section I of the Constitution provides:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or im-

munities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; now deny to any person within its jurisdiction the equal protection of the laws.

The full text of the provisions of Chapter 567, Revised Statutes of Missouri (1979), as enacted by Laws of Missouri, 1977, p. 688, S.B. No. 60, Section 1, eff. January 1, 1979, provides:

567.010. Chapter definitions.—as used in this chapter, the following terms mean:

(1) "Promoting prostitution", a person "promotes prostitution" if, acting other than as a prostitute or a patron of a prostitute, he knowingly

(a) Causes or aids a person to commit or engage in prostitution; or

(b) Procures or solicits patrons for prostitution; or

(c) Provides persons or premises for prostitution purposes; or

(d) Operates or assists in the operation of a house of prostitution or a prostitution enterprise; or

(e) Accepts or receives or agrees to accept or receive something of value pursuant to an agreement or understanding with any person whereby he participates or is to participate in proceeds of prostitution activity; or

(f) Engages in any conduct designed to institute, aid or facilitate an act or enterprise of prostitution;

(2) "Prostitution", a person commits "prostitution" if he engages or offers or agrees to engage in

sexual conduct with another person in return for something of value to be received by the person or by a third person;

(3) "Patronizing prostitution", a person "patronizes prostitution" if

(a) Pursuant to a prior understanding, he gives something of value to another person as compensation for that person or a third person having engaged in sexual conduct with him or with another; or

(b) He gives or agrees to give something of value to another person on an understanding that in return therefor that person or a third person will engage in sexual conduct with him or with another; or

(c) He solicits or requests another person to engage in sexual conduct with him or with another, or to secure a third person to engage in sexual conduct with him or with another, in return for something of value;

(4) "Sexual conduct" occurs when there is

(a) "Sexual intercourse" which means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results; or

(b) "Deviate sexual intercourse" which means any sexual act involving the genitals of one person and the mouth, tongue or anus of another person; or

(c) "Sexual contact" which means any touching, manual or otherwise, of the anus or genitals of one person by another, done for the purpose of arousing or gratifying sexual desire of either party;

(5) "Something of value" means any money or property, or any token, object or article exchangeable for money or property.

567.020. Prostitution.—1. A person commits the crime of prostitution if he performs an act of prostitution.

2. Prostitution is a class B misdemeanor.

567.030. Patronizing prostitution.—1. A person commits the crime of patronizing prostitution if he patronizes prostitution.

2. Patronizing prostitution is a class B misdemeanor.

567.040. Prostitution and patronizing prostitution —sex of parties no defense, when.—In any prosecution for prostitution or patronizing a prostitute, the sex of the two parties or prospective parties to the sexual conduct engaged in, contemplated or solicited is immaterial, and it is no defense that

(1) Both persons were of the same sex; or

2. The term "compelling" includes

or solicited something of value was a male and the person who gave or agreed or offered to give something of value was a female.

567.050. Promoting prostitution in the first degree.—1. A person commits the crime of promoting prostitution in the first degree if he knowingly

(1) Promotes prostitution by compelling a person to enter into, engage in, or remain in prostitution; or

(2) Promotes prostitution of a person less than sixteen years old.

2. The term "compelling" includes

(1) The use of forcible compulsion.

(2) The use of a drug or intoxicating substance to render a person incapable of controlling his conduct or appreciating its nature.

(3) Withholding or threatening to withhold dangerous drugs or a narcotic from a drug dependent person.

3. Promoting prostitution in the first degree is a class B felony.

567.060. Promoting prostitution in the second degree.—1. A person commits the crime of promoting prostitution in the second degree if he knowingly promotes prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes.

2. Promoting prostitution in the second degree is a class C felony.

567.070. Promoting prostitution in the third degree.—1. A person commits the crime of promoting prostitution in the third degree if he knowingly promotes prostitution.

2. Promoting prostitution in the third degree is a class D felony.

567.080. Prostitution houses deemed public nuisance.—1. Any room, building or other structure regularly used for sexual contact for pay as defined in Section 567.010 or any unlawful prostitution activity prohibited by this chapter is a public nuisance.

2. The attorney general, circuit attorney or prosecuting attorney may, in addition to all criminal

sanctions, prosecute a suit in equity to enjoin the nuisance. If the court finds that the owner of the room, building or structure knew or had reason to believe that the premises were being used regularly for sexual contact for pay or unlawful prostitution activity, the court may order that the premises shall not be occupied or used for such period as the court may determine, not to exceed one year.

3. All persons, including owners, lessees, officers, agents, inmates or employees, aiding or facilitating such a nuisance may be made defendants in any suit to enjoin the nuisance, and they may be enjoined from engaging in any sexual contact for pay or unlawful prostitution activity anywhere within the jurisdiction of the court.

4. Appeals shall be allowed from the judgment of the court as in other civil actions.

567.090. Preemption and standardization.—The general assembly by enacting this chapter intends to preempt any other regulation of the area covered by felony sections 567.050 through 567.070, to promote state-wide control of prostitution, and to standardize laws that governmental subdivisions may adopt in other areas covered by this chapter. No governmental subdivision may enact or enforce a law that makes any conduct in the area covered by sections 567.050 through 567.070 subject to a criminal or civil penalty or sanction of any kind. Cities and towns may enact and enforce laws prohibiting and penalizing conduct subject to criminal or civil penalties or sanctions under other provisions of this chapter, but the provisions of such laws shall be the same and the authorized penalties or sanctions under such laws shall not be greater than those of this chapter. Cities and towns may also

enact and enforce laws prohibiting and penalizing public solicitation of sexual conduct, whether or not the offer to engage in sexual conduct is in return for something of value, and health laws to prevent the spread of venereal diseases.

567.100. Responsibilities of prosecuting attorneys and attorney general.—In addition to the responsibility of circuit attorneys and prosecuting attorneys in their respective jurisdictions to enforce the criminal provisions of this chapter, they shall have the duty to enforce the provisions of section 567.080; and the attorney general shall have a concurrent duty to enforce the civil provisions of section 567.080.

APPENDIX B

Excerpts From Affidavit Introduced by Petitions in District Court

Pertinent portions of the Model Penal Code Section 207.12, Comment (Tent. Draft No. ....., 1959) and supporting affidavit of Edward Hunvald introduced by petitioners at the hearing of January 3, 1979 before the District Court, state as follows:

"AFFIDAVIT

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

COMES NOW Edward H. Hunvald, and being first duly sworn (upon oath, states as follows:

* * *

"7. The Committee in considering the prostitution offenses followed basically the approach of the

Model Penal Code and the New York Penal Code which in turn was based largely on the Model Penal Code and the Comments to the tentative draft of the Model Penal Code, a copy of which is attached to this Affidavit, and incorporated herein as though fully set out herein, was considered by the Subcommittee. The Committee's approach to the prostitution offenses was to first consider whether prostitution should be covered in the Code, and it was decided to draft provisions and present them to the legislature as a part of the Code. In deciding upon the definition of 'prostitution', the Committee followed the approach of the Model Penal Code and made the definition broader than simply sexual intercourse and included 'sexual contact' as part of the definition of 'sexual conduct.' The Committee's approach was basically to cover sexual activity of a commercial nature.

"Model Penal Code, Comments to Section 207.12:

1. * * *

Although prostitution appears to respond to a widespread demand, and despite indications that a substantial proportion of prostitutes are victims of social and psychic conditions beyond their control, most students of the problem favor penal repression of commercialized sex. Religious and moral ideas undoubtedly are the main force behind the demand for repression; but utilitarian arguments are also available. Prostitution is an important source of venereal disease,[10]* although some contend that the 'amateurs' to whom men turn in lieu of prostitutes present a greater danger in this respect.[11]* It has been observed that prostitution is a source of profit and power for criminal groups who commonly combine it with illicit trade in drugs and

liquor, illegal gambling and even robbery and extortion.[12]* Prostitution is also a source of corrupt influence on government and law enforcement machinery. Its promoters are willing and able to pay for police protection; and unscrupulous officials and politicians find them an easy mark for extortion.[13]* Finally, some view prostitution as a significant factor in social disorganization, encouraging sex delinquency and undermining marriage, the home, and individual character.[14]* (p. 171)

2. *Sexual Activity.* This term as defined in Subsection (6) covers not only sexual intercourse but also other lewd acts. Some existing laws confine themselves to offering or receiving the body for 'inter-Course.'[22]* Since commercial prostitution offers and even features abnormal forms of sexual gratification, it is important to include this. Male as well as female prostitution is covered.[23]* The Section extends to sexual display not involving contact with the customers, for example, catering to the perverse desire to observe others in sexual activity ('voyeurism'), since this would fall within the definition of 'lewd act' in Section 207.9." (p. 174)

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*Footnotes omitted.

APPENDIX C

Questions Presented to the Supreme Court in Prior Cases Involving Laws Prohibiting Massage Parlor Practices

No. 72-189 *Kisley v. City of Falls Church*

Business regulation—Massage parlors—Ban on service rendered to customer by person of opposite sex.

Ruling below (Va SupCt, 40 LW 2616):

Falls Church, Virginia ordinance that prohibits operation of "massage salon, bath parlor, or any similar type business" where service rendered to customer is by person of opposite sex does not deprive operators of such businesses of property rights without due process of law or deny them or their employees equal protection of law.

Questions presented: (1) Does Falls Church, Virginia ordinance that prohibits operation of "massage salon, bath parlor, or any similar type business" where service rendered to customer is by person of opposite sex violate Fourteenth Amendment's Due Process and Equal Protection Clause in that ordinance arbitrarily interferes with operators' legitimate occupation and constitutes unreasonable exercise of police power premised on sex discrimination? (2) Does such ordinance make arbitrary distinction between certain persons or classes of persons?

(41 U.S. Law Week 3123)

No. 73-1609 *Rubenstein v. Cherry Hill*

QUESTIONS PRESENTED

1. Whether Ordinance 71-51 of the Township of Cherry Hill, New Jersey, creates a classification based upon sex which does not bear a close rational relationship to a compelling state interest and thus is violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

2. Whether Ordinance 71-51 of the Township of Cherry Hill, New Jersey, constitutes an unreasonable exercise of the police power by the Township of Cherry Hill in that it regulates conduct in an overbroad manner when alternative and less intrusive methods are possible and thus is violative of due process of law under the Fourteenth Amendment to the United States Constitution.

3. Whether Ordinance 71-51 is repugnant to federal law in that it conflicts with the purposes sought to be achieved by 42 U.S.C. §2000-e of the 1964 Civil Rights Act and thus is violative of Article VI of the United States Constitution.

(Appellants' Jurisdictional Statement, p. 3)

74-336. *Smith v. Keator*

Business regulation—Massage parlors—Ban on intersexual massages—Constitutionality.

Ruling below (NC SupCt, 285 NC 530, 206 SE2d 203):

Municipal licensing ordinance prohibiting massage parlor employees from massaging members of opposite sex does not discriminate on basis of sex, is reasonable and not arbitrary, and has fair and substantial re-

lation to object of eliminating "immoral acts likely to result from too intimate familiarity of the sexes"; ordinance's licensing provisions, as interpreted to entitle licensee to hearing before revocation of license and to require reasonable grounds for denial or revocation of license, are constitutional.

Questions presented: (1) Does municipal ordinance that prohibits employees of health salons or massage parlors from treating members of opposite sex irrationally discriminate on basis of sex in violation of Fourteenth Amendment's Equal Protection Clause? (2) Is municipal ordinance that permits city council to revoke license of any person to operate massage parlor whenever in sound discretion of council revocation is deemed to be in best interest of health, safety, welfare, or morals of city's people unconstitutionally vague, overbroad, and without standards?

(43 U.S. Law Week 3270)

78-73. *Wright v. City of Indianapolis*

Business regulation—Massage parlors—Inspections—Ban on massage by opposite sex.

Ruling below (Ind SupCt, 371 NE2d 1298):

Massage parlor ordinance that prohibits massage therapist from administering massage to person of opposite sex does not violate due process and equal protection provisions of U.S. Constitution; massage parlors, as licensees in regulated business, impliedly consent to inspections that, pursuant to ordinance, are limited to business hours and other reasonable times; court cannot presume that city officials will conduct inspections in manner that is other than constitutional; ordinance that requires massage parlors to be open

for inspection during all business hours and at other reasonable times by police officers, health and fire inspectors, and duly authorized representatives of city controller upon showing of proper credentials is not unreasonable and does not contravene prohibitions of state or federal constitutions.

Questions presented: (1) Did court below improperly rule that massage parlor ordinance prohibiting massages by members of opposite sex is not violative of due process or equal protection provisions of federal or state constitutions? (2) Did court below improperly rule that as member of regulated business, licensee impliedly consents to inspection at any and all reasonable times and places by obtaining license? (3) Did court below err in ruling that it would not presume that city officials would conduct inspections of massage parlors in other than constitutional manner? (4) Did court below improperly rule that inspection scheme authorized by massage parlor ordinance was not unreasonable or in contravention of prohibitions of state or federal constitutions, and further improperly rule that it was unnecessary to pursue petitioner's constitutional arguments pertaining to opposite sex massage ordinances as violative of due process and equal protection provisions of state and federal constitutions? (5) Is it violation of Equal Protection Clause of Fourteenth Amendment for municipal ordinance to prohibit employees of massage parlors from treating members of opposite sex? (6) Did court improperly rule that city did not engage in conclusive presumption that massage of opposite sex will cause social and moral problems and lead to illicit and illegal sexual activities?

(47 U.S. Law Week 3157)

78.420. *Caesar's Health Club v. St. Louis County*

Ruling below (Mo CtApp, 4/11/78):

Massage parlor operators' failure to assert protectable interest in fundamental right to privacy renders "compelling state interest" test inapplicable to county prostitution ordinance that would prohibit massage activities involving sexual touching; county prostitution ordinance that discloses on its face purpose to protect and further health, morality, and general welfare of citizenry, and that furthers its purpose in reasonable way is valid; assuming massage parlor operators' vicarious standing to assert masseuses' and customers' privacy rights relating to private sexual conduct between consenting adults, operators' commercialization of massages involving sexual touching remove such activities from sphere of protectable right of privacy; ordinance should not be declared overbroad on basis of frivolous and speculative claims that language defining prostitution as including any "touching * * * of the anus or genitals of one person by another" will be invalidly applied to proscribe normal functions of obstetricians, gynecologists, urologists proctologists, nurses, and baby sitters.

Questions presented: (1) Did trial court's failure to require, and respondent's failure to show, compelling state interest to justify challenged ordinance deprive petitioners of rights guaranteed them under U.S. Constitution? (2) Did challenged ordinance violate fundamental rights of privacy afforded petitioners by U.S. Constitution? (3) Did challenged ordinance violate petitioners' rights to due process of law as guaranteed by U.S. Constitution by reason of its overbreadth?

(47 U.S. Law Week 3303-3304)